

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

DAVID ZINK, et al.,)	
)	
Plaintiffs,)	No. 2:12-CV-4209
)	
v.)	This is a capital case
)	
GEORGE A. LOMBARDI, et al.,)	Execution of Plaintiff Smulls
)	scheduled January 29, 2014
Defendants.)	

MOTION TO FIND DEFENDANTS IN CONTEMPT AND
REQUESTING IMPOSITION OF SANCTIONS

Plaintiffs, by and through their counsel, respectfully request that this Court issue an Order finding Defendants in contempt based on their failure to comply with this Court's orders directing them to provide discovery by December 16, 2013, regarding the identities of the pharmacist who compounds the pentobarbital used in executions, the physician who provides a prescription for the drug, and the laboratory which tests the drug. (Docs. 203, 204, 205). This Court twice denied Defendants' motions for stay, thereby requiring compliance by the end of the day on December 16, 2013. Defendants failed to produce the requested discovery by the midnight deadline, and, further, failed to respond to repeated emails from Plaintiffs' counsel indicating they were awaiting the discovery.

Based on Defendants' complete failure to comply with this Court's repeated

orders regarding discovery, Plaintiffs respectfully request that this Court, upon issuing a finding of contempt, impose appropriate sanctions on Defendants, including barring them from carrying out any further executions until they have complied with all discovery orders. In further support of the present motion, Plaintiffs state as follows:

MEMORANDUM IN SUPPORT

1. On December 12, 2013, this Court held a teleconference to address Defendants' objections to producing certain discovery, specifically the identities of the pharmacist who compounds the pentobarbital used in executions, the physician who provides a prescription for the drug, and the laboratory that tests the drug. After hearing arguments regarding Section 546.720 RSMo and Defendants' claimed privileges, this Court ordered Defendants to produce the requested information, and to do so no later than December 16, 2013. (Docs. 203, 204). This Court also denied Defendants' Motion for a Protective Order regarding the same information. (Doc. 205).

2. Defendants subsequently filed a petition for writ of prohibition or mandamus in the United States Court of Appeals for the Eighth Circuit, asking that Court to prohibit the District Court from enforcing the orders in Docs. 203, 204 and 205. That petition remains pending. Defendants also requested from the Eighth Circuit a stay of the District Court's orders. That motion has not been ruled.

3. Defendants also filed two motions in the District Court seeking a stay of the District Court's order during the pendency of the Eighth Circuit appeal. After hearing

arguments from both sides during a second teleconference, this Court denied both motions for stay. (Docs. 213, 215).

4. Recognizing the sensitivity of the requested discovery, the Court took steps to limit dissemination of the information, ordering that the information be provided to only two of Plaintiffs' attorneys (Joseph Luby and Cheryl Pilate), that the disclosure of information to any additional attorneys would require a court order, that Mr. Luby and Ms. Pilate refrain from directly identifying to any other person the pharmacist, physician or laboratory, that Defendants' counsel cooperate with Plaintiffs' counsel to maintain confidentiality when information is sought from state agencies, and, further, that Plaintiffs' counsel and Defendants' counsel confer on drafting a confidentiality agreement to be used with any third party from whom information is sought concerning the pharmacist, physician or laboratory.

5. After this Court denied Defendants' motions at 4:37 p.m. and 5:30 p.m. on December 16, 2013 (Docs. 213, 215), Plaintiffs' counsel sent several emails to Defendants' counsel indicating they anticipated compliance with the Court's orders and were awaiting the discovery. Indeed, they indicated they would be working into the evening and asked that the discovery be immediately provided via email.

6. Counsel sent the first of several emails at 5:47 p.m.. That email stated:

From: Cheryl Pilate <cpilate@morganpilate.com>
Date: Mon, Dec 16, 2013 at 5:47 PM
Subject: Zink v. Lombardi - compliance with discovery order -
CONFIDENTIAL
To: Mike Spillane <mike.spillane@ago.mo.gov>, Stephen Hawke
<stephen.hawke@ago.mo.gov>
Cc: Joe Luby <jluby@dplclinic.com>

Dear counsel: The district court has denied the motion for stay, and the date for compliance with the discovery order remains December 16, 2013. We are aware that you have pending litigation in the 8th Circuit. That said, the district court's order was explicit that the discovery was to be provided no later than today. Please be advised that both Mr. Luby and I are both in our offices awaiting the discovery. I will be in front of my laptop until midnight, given today's deadline for compliance. Mr. Luby and I are well aware of the requirement of confidentiality as explicitly addressed by the Court. Until we have agreement on the confidentiality agreement to be used with third parties, please be advised that Mr. Luby and I will take no steps to discuss the discovery with anyone or to conduct any investigation whatsoever. Such investigation will only occur once we have the confidentiality agreement in place.

We are awaiting your compliance. As stated, there is no stay order in place so we are anticipating receiving the discovery today. Thank you.

7. Counsel sent follow-up emails at 7:00 p.m., 7:13 p.m., and 7:21 p.m.

Counsel received “read” receipts from defense counsel, indicating that the emails had been received and reviewed. At 7:13 p.m., counsel attached to their email a proposed confidentiality agreement (*see* attached Exhibit A), that was adapted from standard language used in civil cases when third parties are asked to view material covered by a protective order. Defense counsel did not respond in any way to the proffered confidentiality agreement, nor did defense counsel respond to any of the

emails.

8. Federal Rule of Civil Procedure 37(b)(2) provides for sanctions, up to and including contempt, when a party has failed to obey a court's discovery order. In *Jo Ann Howard & Associates, P.C. v. Cassity*, 2013 WL 5276030 (E.D. Mo. 2013), the district court stated:

Rule 37 provides district courts broad discretion to sanction parties that fail to obey an order to provide or permit discovery. Rule 37(b)(2) provides a non-exclusive list of sanctions district courts may issue for not obeying a court order where an action is pending....The remedies listed in Rule 37(b)(2)(A) include prohibiting the disobedient party from supporting or opposing designated claims or defenses, and treating as contempt of court the failure to obey any discovery order except for an order to submit to a mental or physical examination.

Cassity, 2013 WL 5276030 *5.

9. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court recognized that if a party fails to comply with a request for discovery, the court “may issue an order directing compliance that is enforceable by the court’s contempt powers.” *Id.* at 30. See also *Schleper v. Ford Motor Co., Auto. Div.*, 585 F.2d 1367, 1371 (8th Cir. 1978); *Gaulden v. City of Desloge*, 2009 WL 690157 (E.D. Mo. 2009).

10. In addition to a finding of contempt, the court may impose a variety of sanctions, including striking the pleadings of a noncompliant party and entering judgment by default against that party. Rule 37(b)(2) also provides that the court

“shall require” the disobedient party and the attorney advising that party to pay the reasonable attorneys’ fees and expenses of the opposing party. *Ligas v. IPD Sales & Marketing LLC*, 2007 WL1992660 *2 (E.D. Mo. 2007).

11. In the present case, this Court has issued an order compelling discovery, and Defendants have violated that order, thereby causing prejudice to Plaintiffs. In those circumstances, sanctions under Rule 37 are appropriate. *Id.* at *2.

12. Based on Defendants’ continued and willful failure to comply with the orders of this Court, Plaintiffs respectfully request that this Court: (1) issue an order requiring immediate compliance with the Court’s discovery orders; (2) issue a finding of contempt against Defendants; (3) prohibit Defendants from carrying out any further executions until they have complied with this Court’s orders; and (4) grant any further equitable relief to justly enforce and carry out the orders of this Court.

WHEREFORE, based on the above and foregoing arguments and authorities, Plaintiffs respectfully request that this Court issue an order directing Defendants to immediately provide the requested discovery, issue a finding of contempt against Defendants, prohibit Defendants from carrying out any further executions until they have complied with this Court’s orders, and grant any further equitable relief deemed appropriate to enforce and carry out this Court’s orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded for transmission via Electronic Case Filing (ECF) this 17th day of December, 2013, to Michael J. Spillane, Stephen D. Hawke, and Susan D. Boresi, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

/s/ Cheryl A. Pilate

Counsel for Plaintiffs Smulls and Bucklew